BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN D. CUTCHLOW Claimant	)	
VS.	)	
UNIVERSITY OF KANSAS HOSPITAL AUTHORITY Respondent	)	Docket No. 1,057,361
AND	)	
SAFETY FIRST INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 10, 2012, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) announced at the February 10, 2012, preliminary hearing that he would not revisit the issues concerning date of accident and old versus new law and his previous findings on those issues remained the same. The ALJ did not state what his previous findings on those issues were, but in his Order of November 14, 2011, Judge Howard held:

> The Administrative Law Judge finds the old act applies under the facts herein presented, and claimant's date of accident is 8/2/2011, the date written notice as [*sic*] given to his employer. No physician took claimant off work, imposed work restrictions or provided written documentation of a work related injury prior to said date.[1]

[1] ALJ Order (Nov. 14, 2011) at 1.

The ALJ did not specifically state that claimant met his burden of proving he sustained personal injury or injuries by a series accidents arising out of and in the course of his employment in either Order. It can be presumed he so found as he ordered respondent to pay unauthorized medical expenses and ordered the parties to agree upon a specialist to treat claimant's injuries.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 7, 2012, Preliminary Hearing and the exhibits; the transcript of the November 8, 2011, Preliminary Hearing; and the transcript of the September 13, 2011, Preliminary Hearing, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant failed to prove he suffered a series of accidental injuries that arose out of and in the course of his employment. In the event the Board finds claimant suffered injuries that arose out of and in the course of his employment, respondent asserts that the ALJ erroneously held that claimant gave respondent timely notice of his series of accidents. Respondent argues the ALJ incorrectly fixed claimant's date of accident as August 2, 2011, and further incorrectly found that the Old Act applies to this claim. Respondent maintains the New Act[2] applies and that thereunder claimant's date of accident is the date the claimant last worked, April 26, 2011. Respondent argues that claimant's notice is untimely under the notice provisions of the New Act.

Claimant argues that the claim is not covered under the New Act but is instead governed by the Old Act because claimant's last day of work was on April 26, 2011, before the New Act became effective. Claimant also asserts that he provided timely notice of his alleged repetitive accidents pursuant to the Old Act. Finally, claimant maintains that the preponderance of the credible evidence supports the ALJ's finding that claimant's bilateral carpal tunnel syndrome arose out of and in the course of his employment with respondent.

The issues for the Board's review are:

1. Did claimant meet with personal injury or injuries by a series of accidents or repetitive traumas that arose out of and in the course of his employment with respondent?

2. Did claimant give respondent timely notice of his accident or accidents? What is claimant's date of accident? Is this case covered under Old Law or New Law?

[2] The New Act became law on May 15, 2011.

FINDINGS OF FACT

This case came before Board Member Gary Terrill after an appeal of the ALJ's Order of November 14, 2011. In his Order entered January 11, 2012, Board Member Terrill made the following findings of fact:

> Claimant was age 53 on the date of the November 8, 2011, preliminary hearing. He had worked for respondent for approximately 31 years. For the past 20 years he worked as a radiology tech assistant. Claimant was a full-time employee and he worked daily shifts of 8 1/2 hours. His job required him to lift patients; work on the computer; run film in the processors; and transport patients in wheelchairs and carts. He said he used his hands and arms "[j]ust about all day."[3] The amount of time he worked on a computer averaged 5 1/2 hours per day.
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> Claimant offered into evidence a written job description for radiology assistant which had been signed by claimant and his supervisor on June 15, 2010.[4] The job description indicates that claimant had to lift up to 40 pounds; push over 250 pounds; perform duties requiring manual dexterity; and reach below and above shoulder level. His last day of work for respondent was April 26, 2011.[5] Claimant gave written notice of his alleged repetitive bilateral carpal tunnel injuries on July 31, 2011, or August 1, 2011.
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> The only medical evidence is a report of an EMG/NCV test performed on July 25, 2011. The referring physician was a cardiologist whom claimant consulted on his own, Dr. George Pierson. The EMG report indicates that claimant presented with complaints of bilateral upper extremity pain and paresthesias for over one year. There is no history in the report regarding how claimant's symptoms developed. No mention is made of claimant's work as either causing or aggravating his symptoms. The report confirms the presence of moderate bilateral carpal tunnel syndrome; however, the physician who performed the test, Dr. Stephen Rosenberg, expressed no opinion about what caused the condition.
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> Claimant did not testify what effect, if any, his work had on his upper extremities. Claimant did not testify that he associated his pain and numbness with the work he performed for respondent. On the contrary, claimant thought the problems with his hands might have been related to his heart, which presumably prompted him to consult a cardiologist.

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[3] P.H. Trans., (Nov. 8, 2011) at 11.

[4] P.H. Trans., (Nov. 8, 2011) Ex. 1.

[5] Claimant was terminated by respondent under a point system for excessive absenteeism. P.H. Trans. (Nov. 8, 2011), at 9.

> Claimant has neither been taken off work nor provided with light duty restrictions by any authorized physician. No doctor provided claimant with a diagnosis in writing indicating that his injuries were work-related.[6]

Board Member Terrill found:

> Claimant has not satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of and in the course of his employment with respondent.[7]

Board Member Terrill therefore did not decide the issues concerning whether the Old Act or New Act applied, what was the date of accident, or whether claimant gave timely notice of his accident, series of accidents, or repetitive traumas.

A preliminary hearing was held on February 7, 2012. No testimony was taken, but the parties entered medical reports from Dr. Edward J. Prostic and Dr. Erich J. Lingenfelter.

Claimant was seen on January 13, 2012, by Dr. Prostic at the request of claimant's attorney. Claimant told Dr. Prostic he was employed as a radiology technician assistant for respondent and his work tasks involved moving patients, lifting and turning patients, and frequent keying. Claimant said the activity that bothered him most was lifting patients. Claimant had developed pain, numbness and paresthesia of his hands. After examining claimant, Dr. Prostic opined that claimant sustained repetitious minor traumas to his wrists with the development of bilateral carpal tunnel syndrome, as well as evidence of mild cervical radiculopathy, caused by repetitious activities during his employment through April 26, 2011.

Claimant was seen on December 30, 2011, by Dr. Lingenfelter at the request of the respondent. Claimant described his job tasks to Dr. Lingenfelter as sliding patients over from the x-ray machine and transporting patients. He examined claimant and found he had swelling in both thumb CMC joints as well as fingers. He diagnosed claimant with bilateral carpal tunnel syndrome and mild degenerative changes in his wrist and hand. Dr. Lingenfelter, however, stated that claimant's pain presentation was atypical for carpal tunnel syndrome. He said the swelling would be explained by the mild degenerative changes in his hands and is not related to the bilateral carpal tunnel syndrome. Dr. Lingenfelter opined:

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[6] *Cutchlow v. University of Kansas Hospital Authority*, No. 1,057,361, 2012 WL 369784 (Kan. WCAB January 11, 2012).

[7] *Id.*

> I find it extremely difficult to pin this on his work related environment after he described to me what he did. This does not involve enough repetitive flexion and in my opinion would not involve the development of flexor tenosynovitis, which is the most common cause. I could understand if he was doing a lot of repetitive typing and keying and desk work, which would be more explainable. But, this work environment does not justify having this fall under a Workman Compensation claim. As I mentioned, I do not doubt that he has it, but I do not think that it has anything to do with his work related environment, because his pain presentation does not even correlate with carpal tunnel syndrome and is explainable by other etiologies unrelated to his work.[8]

PRINCIPLES OF LAW

Old Act

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of"

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[8] P.H. Trans. (Feb. 7, 2012), Resp. Ex. A at 2.

[9] K.S.A. 2010 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

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[11] *Id.* at 278.

New Act

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508 also provides in relevant part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.
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> (f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries

may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

ANALYSIS

The two medical experts disagree as to the cause of claimant's upper extremity conditions. Both doctors diagnosed claimant with bilateral carpal tunnel syndrome. Dr. Prostic also found claimant to have evidence of mild cervical radiculopathy whereas Dr. Lingenfelter also found claimant to have mild degenerative changes of his wrists and hands. Their difference of opinion on the cause of claimant's conditions can be attributed, at least in part, to the different histories upon which their respective opinions rely. Dr. Prostic was told by claimant that his job with respondent "required moving patients, lifting

[12] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

and turning them, and frequent keying."[13] It appears that claimant attributed his symptoms to his employment and in particular said to Dr. Prostic that it was lifting patients that bothered him the most. Dr. Prostic concluded that "[f]rom repetitious activities during the course of his employment through April 26, 2011, [claimant] sustained repetitious minor trauma to his wrist[s] with development of bilateral carpal tunnel syndrome."[14] Treatment was recommended, including a cervical MRI and bilateral decompressive carpal tunnel syndrome surgery.

Conversely, Dr. Lingenfelter was given a history that claimant's work as a radiology tech assistant "involved sliding patients over from the x-ray machine and transporting patients . . . ."[15] Based on a lack of repetitive work activity, Dr. Lingenfelter opined that claimant's work with respondent was not the cause of claimant's bilateral carpal tunnel syndrome condition. He said, "I could understand if he was doing a lot of repetitive typing and keying and desk work, which would be more explainable."[16]

Claimant has worked for respondent for 31 years, the last 20 years as a radiology tech assistant. Claimant testified that about 5 1/2 hours of his work day involved typing patient information into the computer. The rest of his day involved pushing patients in wheelchairs or carts and lifting and positioning patients. Claimant denied having any hand intensive hobbies or doing non-work-related activities that involved repetitive use of his hands.

Based upon the testimony presented to date, it appears that Dr. Prostic had a better understanding of claimant's job tasks than did Dr. Lingenfelter. Claimant's job did require repetitive use of his hands. Dr. Lingenfelter agreed that if claimant's job involved a lot of repetitive typing and keying, then he would be more likely to find claimant's bilateral carpal tunnel syndrome to be work-related. This Board Member finds claimant has met his burden of proving his injuries are work related.

The 2011 amendments to the Workers Compensation Act became effective on May 15, 2011. Claimant's last day of work for respondent was April 26, 2011. The law in effect on the last day claimant was exposed to the injurious work activities will control this

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[13] P.H. Trans. (Feb. 7, 2012), Cl. Ex. 1 at 1.

[14] *Id.* at 2.

[15] P.H. Trans. (Feb. 7, 2012), Resp. Ex. A at 1.

[16] *Id.* at 2.

claim. That is what is referred to as the Old Law.[17] As such, whether claimant gave timely notice is governed by the 10-day rule in K.S.A. 44-520. The 10-days begin on the date of accident. Under K.S.A. 2010 Supp. 44-508(d), claimant's date of accident is the earliest of (1) the date an authorized physician took him off work or restricted him from performing the work which is the cause of his condition, (2) the date he gave written notice to respondent of the injury; or (3) the date his condition was diagnosed as work related and such fact was communicated to him in writing.

Claimant was never taken off work or given restrictions by an authorized treating physician. Claimant's condition was not diagnosed as work related and such fact communicated to him in writing until Dr. Prostic's report of January 13, 2012. Claimant gave respondent written notice on or about August 1, 2011. As such, the date of accident is August 1, 2011.[18] Notice was, therefore, timely.

CONCLUSION

(1) Claimant met with personal injury by a series of accidents that arose out of and in the course of his employment with respondent each and every working day through his last day worked.

(2) Claimant gave timely notice of his series of accidents.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 10, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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[17] There is no point in engaging in the circular logic of applying the Old Law date of accident to find this is a New Law case, which in turn would require a finding of date of accident of April 26, 2011, the last day worked and thus a date that falls under the Old Law. See *Burnom v. Cessna Aircraft Co.*, No. 1,056,443, 2011 WL 6122927 (Kan. WCAB Nov. 28, 2011); see also *Whisenand v. Standard Motor Products, Inc.*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012).

[18] See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

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Steven J. Howard, Administrative Law Judge